United States Court of Appeals

for the Second Circuit

APPELLEE'S BRIEF

ORIGINAL

75-7220

To be argued by
JUDITH S. KAYE

United States Court of Appeals
FOR THE SECOND CIRCUIT
No. 75—7220

BALDT CORPORATION,

Plaintiff-Appellee,

against

TABET MANUFACTURING CO., INC.,

Defendant-Appellant.

ON APPEAL FROM AN ORDER AND JUDGMENT OF THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK

Civil Action No. 73-661 CHT

BRIEF FOR PLAINTIFF-APPELLEE

OLWINE, CONNELLY, CHASE,
O'DONNELL & WEYHER
Attorneys for Plaintiff-Appellee
299 Park Avenue
New York, New York 10017

Of Counsel:
JUDITH S. KAYE
JOSEPH C. KAPLAN

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Statement of Issues Presented for Review

1. Was not the court below correct in its finding that service upon defendant corporation was proper since Mr. Mastracco was an officer of the corporation at the time he was served?

2. Was not the court below correct in its finding that, whether or not Mr. Mastracco technically remained an officer of defendant, service of process upon defendant was proper?

3. As to the claim of "enticement" now raised for the first time in this litigation, would "enticement" into New York (assuming *arguendo* that were a fact) invalidate service where defendant corporation need not be present in New York for the court to acquire personal jurisdiction over it here?

Statement of the Case and Prior Proceedings

In July 1971, Baldt Corporation ("Baldt") sold its Palmer Electric and Manufacturing division ("Palmer") to Tabet Manufacturing Company, Inc. ("Tabet") for $425,000, consisting of $300,000 in cash and $125,000 in notes due quarterly from July 1, 1971 through May 1973 (6a-7a, 14a-15a, 180a).* In November 1972, Tabet defaulted. As a result of Tabet's refusal to pay its obligation on the last three notes, Baldt initiated this action in the Supreme Court of the State of New York, County of New York. Since the action was for recovery on notes, it was commenced by service upon an officer of Tabet of a summons and motion for summary judgment in lieu of complaint, in accordance with Section 3213 of the Civil Practice Law & Rules (3a-58a). Tabet removed the action to the District Court, based upon diversity of citizenship.

In the court below, Baldt moved for summary judgment on the notes, and Tabet cross-moved to dismiss the action for lack of personal jurisdiction. Tabet's sole argument was that the court was without jurisdiction because Mr. Mastracco was not an officer of Tabet at the time of service upon him. Tabet made no claim of "enticement". Affidavits on the respective motions were submitted by both parties (6a-80a), and the questions were fully briefed and argued.

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* All numerical references are to the Joint Appendix. Tabet's Brief is referred to herein as "Brief".

The court below, in a Memorandum Decision dated June 18, 1973 (81a-87a), denied both motions. The court denied Baldt's motion because it found there was a triable issue of fact concerning one provision of the sale Agreement. The court denied Tabet's motion because it found that (a) Mr. Mastracco was an officer of Tabet when he was served, and (b) even if he was technically not an officer, service was proper in the circumstances of this case, since Tabet received fair and adequate notice of this action.

A full year later, during which time discovery was conducted by both parties, the case was tried before the court sitting without a jury (88a-177a). Both parties presented their witnesses, introduced evidence and, at trial and in post-trial memoranda, fully covered the substantive matter that the court below had found to be a triable issue of fact.

In an opinion dated December 24, 1974 (178a-195a), two years after Tabet's default on the notes, the court below, after extensively analyzing the evidence presented by the parties, found for Baldt on the merits, and awarded damages in the amount which had been stipulated to by the parties, including prejudgment interest as agreed to in the notes (192a-193a).

Judgment was entered on January 31, 1975 (196a). Tabet appealed, solely on the basis that the court below erred in finding personal jurisdiction over Tabet. Tabet has raised no question as to the finding below that, on the merits of this dispute, Baldt is clearly entitled to recovery.

Statement of the Facts

While Tabet stresses that it is a foreign corporation not doing business in New York (Brief, p. 3), it is clear that the contract in dispute was entered into by both parties in New York. The negotiations for the sale by Baldt to Tabet concluded in New York City (110a-111a). The closing of the transaction and the execution of the docu-

ments in connection with the sale also took place in New York City (120a).

Hughes Burton, vice-president of Tabet, signed the Agreement and other documents on behalf of Tabet, and his signature was attested to by Vincent J. Mastracco, as Tabet's "Asst. Secretary" (28a, 54a).* This same Mr. Mastracco is the person who was served with process in this action on behalf of Tabet (5a).

The execution of the Agreement was not the final step in the sale of Palmer. The terms of payment were to be spread over a two-year period: $300,000 in cash at the time of the closing, and $125,000 in notes payable through May 1973. Thus, the sale by its very terms was not fully concluded at the closing since the consideration was not fully paid. Moreover, the last two notes (36a-39a) called for a set-off provision if various contingencies, provided for in Paragraph 2.3 of the Agreement, arose—one more aspect of the sale of Palmer that was left open after the closing. In fact, the very basis of this suit is the interpretation of Paragraph 2.3 and the determination of whether the set-off provision applies.

There were other matters in the Agreement that called for action on behalf of the parties after the sale was closed. In Paragraph 3(d) of the Agreement (19a), Baldt agreed to use its best efforts to obtain the consent of other parties to nonassignable contracts. This action necessarily would have had to be taken by Baldt after the execution of the Agreement, and might have entailed additional negotiations and documents, such as novation agreements if demanded by the other parties.

Although Baldt performed its obligations under the Agreement, Tabet did not pay on the note dated Novem-

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* Baldt knew only that Mastracco was Assistant Secretary of Tabet. There is no claim that Baldt saw or knew the terms of the actual resolution electing Mr. Mastracco to this office, and indeed Baldt had no such knowledge.

ber 15, 1972 when it fell due. At that time, a total of $46,875 plus accrued interest remained outstanding. Instead, Tabet tendered to Baldt a check in the amount of $5,538.02 as "Final Payment" (7a-8a, 45a), which was refused by Baldt (7a).

Upon Tabet's default, the entire amount outstanding on the notes became due and payable immediately (55a-58a). Tabet refused to pay, and a meeting was then scheduled at Baldt's office for January 22, 1973. Appearing on behalf of Tabet once again was Mr. Mastracco (61a-62a, 65a). After the meeting, Mr. Mastracco was served with the process herein as an officer of Tabet (5a).

The single provision of the Agreement disputed by Tabet related to payment on the notes. The Agreement provided that, if Palmer's "Accounts Payable" exceeded its "Accounts Receivable" plus "Cash" on its June 1971 Balance Sheet, Tabet could offset any such excess against the outstanding notes. When it developed that there was no excess, and therefore could be no offset, Tabet contended that "Accounts Payable", although in capital letters and quotation marks referring to a line in the Palmer Balance Sheet annexed to the Agreement, meant not "Accounts Payable", but all payables of Palmer.

On this issue, and now on the issue of service of process, Tabet has thus far succeeded in avoiding its obligation to Baldt on promissory notes for years. Additionally, Tabet stands to benefit from a significant differential in interest between the legal rate payable on a judgment and the rate agreed upon in the notes.

Thus, Tabet has not only wrongfully withheld the funds and deprived Baldt of the use of its money, but also—unless this Court orders otherwise—would be financially benefited in prolonging this litigation by a rate of interest less than it had agreed to pay Baldt.

ARGUMENT

POINT I

The District Court did not err in its finding of fact that by reason of his office, service upon Mr. Mastracco was proper.

It is undisputed that Mr. Mastracco was elected Assistant Secretary of Tabet by a formal act of the Board of Directors of Tabet at a meeting held on July 6, 1971, at which time a resolution to that effect was adopted (63a). It is further undisputed that Mastracco acted as an officer of Tabet on July 7, 1971 when he signed documents on its behalf (28a, 54a, 65a). Tabet claims, however, that at some point between July 7, 1971 and January 22, 1973, Mastracco ceased to be an officer of Tabet. This claim has no basis in fact or law.

A. There Was No Formal Termination of Mr. Mastracco's Status as an Officer of Tabet.

As Judge Tenney found in his decision upholding jurisdiction over Tabet, there was "no evidence that Mastracco resigned or otherwise terminated his office between July 6, 1971, and January 22, 1973" (82a). Tabet now claims on appeal that such proof is unnecessary, since his tenure terminated simply by operation of law (Brief, p. 12). However, Tabet does not cite a single authority to support the assertion that a corporate officer, duly elected by a Board of Directors can be divested of his office without correlative Board action.

Just as the law provides for election of a corporate officer, the Virgina Code (§ 13.1-46) provides a procedure for the removal of officers by the Board of Directors. While the formal procedures of the statute were followed by Tabet in the election of Mr. Mastracco as its Assistant

Secretary, it took none of the formal procedures in the law to remove him from this office. Of course, Mr. Mastracco could at any time have resigned his office. Yet neither the Board of Directors nor Mr. Mastracco ever took any formal steps to terminate his tenure as an officer. Thus, he remained an officer of Tabet, and was such when he was served.

B. Mr. Mastracco's Term Did Not Expire.

Tabet's argument that Mr. Mastracco's tenure as an officer simply expired by operation of law is further deficient since, under the very terms of the resolution, his office and his authority clearly had not expired.

Tabet confuses the *duties* of an officer and the *term* of his office (Brief, p. 14). The resolution sets forth the duties that Mr. Mastracco was to perform as Tabet's Assistant Secretary. It does not specify the term of his office.

Further, Tabet advances the erroneous argument that the duties of Mr. Mastracco, namely the executing of "notes, agreements, *and other documents pertaining to the acquisition by . . . [Tabet] of the assets of Palmer . . .*" (63a, emphasis added), ended on July 7, 1971. Yet, there certainly could be other documents "pertaining to the acquisition" after July 7, including (a) novation agreements pursuant to paragraph 3(d) of the Agreement (19a), (b) documents concerning notes that were to be paid off over almost two years after the closing, and (c) a settlement agreement that could have arisen during the meeting in New York on January 22, 1973. Since all of these documents would still have pertained to the acquisition, by the very words of Tabet's resolution Mr. Mastracco would have retained his authority to sign for Tabet as Assistant Secretary.

Thus it is clear that even if the duties of Mr. Mastracco as set forth in the resolution could be read as a limitation

on his term of office, that term would not have been concluded until the entire acquisition transaction had been completed—an event that has unfortunately not yet transpired.

C. Since Mr. Mastracco Was Assistant Secretary of Tabet, it Was Proper to Make Service on Him.

However restricted Mr. Mastracco's actual authority may have been, because he held the office of Assistant Secretary, it was proper to make service upon him as a corporate officer.

All corporate officers may have limitations on their duties; a president usually has far broader authority than a corporate secretary. Yet, notwithstanding the actual powers bestowed on an officer, under New York law service may be made upon *any* officer of a corporation, domestic or foreign, and such service is sufficient to confer jurisdiction over the corporation. Civil Practice Law & Rules § 311.* An Assistant Secretary clearly is an officer of a corporation within the meaning of this provision. 1 Weinstein, Korn & Miller, *New York Civil Practice* ¶ 311.02 (1974).

Thus, the finding below that Mr. Mastracco was still an officer of Tabet when he was served in this action, and therefore service was proper, is amply supported by the record and should be affirmed.

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* Tabet's lengthy argument concerning the law of agency (Brief, pp. 18-21) is irrelevant. Whatever principles might govern service on an agent, the New York law sets down a specific procedure for service on a corporate officer.

POINT II

The court had jurisdiction over Tabet even if Mastracco was technically not an officer when he was served.

The court below was correct in upholding jurisdiction over Tabet for the further reason that, even if "service did not comply with the literal terms of the applicable statute, it certainly gave fair and adequate notice to Tabet" (83a).

Tabet does not dispute that it had adequate notice of the action. Tabet's extensive participation in the proceedings at every stage is ample proof of that. In addition, there is no dispute that, the contract having been made in New York, the court had subject matter jurisdiction, and service on Tabet could even have been effectuated outside New York. Thus, even assuming *arguendo* that Mastracco was technically no longer an officer of Tabet when he was served, Tabet's due process rights were plainly not violated.

In *Lumbermens Mutual Casualty Co.* v. *Borden Co.*, 268 F.Supp. 303 (S.D.N.Y. 1967), the court, deciding an issue of New York State procedure, found that

> "[a]lthough service in these cases did not comply with the literal terms of the applicable statute [Article 3 of the CPLR], each service did accomplish its intended purpose—giving fair and adequate notice to defendant of the commencement of an action against him." *Id.* at 310.

This standard of "fair and adequate notice to defendants" was certainly met in the present action by the service on Mr. Mastracco.

As the court held in *Koninklijke Luchtvaart Maatschappij N.V.* v. *Curtiss-Wright Corp.*, 17 F.R.D. 49, 51 (S.D.N.Y. 1955), rules of service do not "require that it

be surrounded by medieval formalism." This entire proceeding should not be invalidated because of what, at worst, might be described as a highly technical error, which caused no harm to Tabet since it was and remains subject to suit here, had adequate notice, and fully participated in the proceedings at every stage.

New York State courts similarly have applied the standard of fair and adequate notice to defendant. In *Green* v. *Morningside Heights Housing Corp.*, 13 Misc.2d 124, 177 N.Y.S.2d 760 (Sup. Ct.), *aff'd*, 7 A.D.2d 708, 180 N.Y.S.2d 104 (1st Dep't 1958), service was made on a receptionist who was not an officer, director, or other agent authorized to accept service on behalf of the corporate defendant. Since she passed the process on to the proper parties, the court found the service to be effective. In *Davidman* v. *Ortiz*, 63 Misc.2d 984, 314 N.Y.S.2d 198 (Sup. Ct. 1970), the court adopted the rationale of *Lumbermens Mutual* and upheld service made on defendant's attorney in the presence of defendant. The court concluded that the prime objective of service is to give notice to the defendant on the claim, and that objective was met even though literal compliance with the statute was not had. *See also, Willo-Peer Corp.* v. *Bronx River Soundview Community Corp.*, 77 Misc.2d 275, 353 N.Y.S.2d 671 (Civil Ct. 1974), which follows *Green;* and 1 Weinstein, Korn & Miller, *New York Civil Practice* ¶ 311.06 (1974).

Tabet's reliance on *McDonald* v. *Ames Supply Co.*, 22 N.Y.2d 111, 291 N.Y.S.2d 328, 238 N.E.2d 726 (1968), is misplaced. In that case, a building employee who was completely unrelated to the defendant corporation, was served with process. However, in the present action, as in *Green*, the person served was one who had a close relationship to the corporation. *McDonald* clearly did not overrule *Green*. See *Belofatto* v. *Marsen Realty Corp.*, 62 Misc. 2d 922, 310 N.Y.S.2d 191 (Civil Ct. 1970); *Matter*

of Adler (Damor Realty Corp.), N.Y. Law Journal, January 27, 1969, p. 19, col. 2 (Sup. Ct.).*

Even if Mr. Mastracco was technically not an officer of Tabet when he was served, such service was valid since it gave Tabet fair and adequate notice of the action. This finding of the court was clearly correct and should be affirmed.

POINT III

Tabet's belated claim of "enticement" is without merit.

Had Tabet seriously believed that it was wrongfully lured into the jurisdiction, surely it would have raised this argument earlier. There was after all a full hearing just on the issue of service of process and jurisdiction. Tabet's belated argument in this Court demonstrates not only its lack of validity but also Tabet's bad faith in its prolonged effort to avoid payment of a just debt.

Moreover, the argument is without merit. While a court will not acquire jurisdiction over a person through fraudulent means, and enticement of a person not otherwise subject to personal jurisdiction here would invalidate service, those are simply not the facts before this Court. The New York courts clearly had subject matter jurisdiction over this dispute and, by virtue of New York's "long-arm" statute, personal jurisdiction over Tabet could have been acquired by service outside the state. It was not essential to lure Mr. Mastracco or another Tabet officer into this state in order for the court to acquire personal jurisdiction

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* A greater liberality has been expressed with regard to service of process on foreign corporations. The definition of a "managing agent" of a foreign corporation has been broader than in the case of a domestic corporation because there is a "scarcity of alternate personnel available to receive process." 1 Weinstein, Korn & Miller, *New York Civil Practice* ¶ 311.05 (1974).

in this case. In these circumstances, "enticement"—even if it was found to have taken place—would not invalidate service. *Headly* v. *Noto,* 45 Misc.2d 284, 256 N.Y.S.2d 750 (Sup. Ct.), *aff'd,* 24 A.D.2d 493, 261 N.Y.S.2d 846 (2d Dep't 1965); 1 Weinstein, Korn & Miller, *New York Practice* ¶ 308.10 (1974).

Since in this case the court had jurisdiction over Tabet under CPLR 302(a)(1) (transaction of business in New York out of which the cause of action arises), and could have served Tabet even at its offices in Virginia under CPLR 313, the alleged enticement of Mastracco to New York did not confer jurisdiction on the court and is thus irrelevant to the question of validity of service.

Conclusion

Based upon the foregoing facts and authorities, it is respectfully submitted that the Order and Judgment of the court below should be affirmed. In addition, in view of the circumstances presented, Baldt respectfully submits that interest on Tabet's debt should run at the rate provided in the notes.

June 16, 1975.

Respectfully submitted,

OLWINE, CONNELLY, CHASE,
O'DONNELL & WEYHER
Attorneys for Plaintiff-Appellee
299 Park Avenue
New York, New York 10017

Of Counsel:
JUDITH S. KAYE
JOSEPH C. KAPLAN